



# The State of International Law in The Hague

Editorial

*Harry Post*

In the half year since December 2005 when the Hague Justice Portal (Portail Judiciaire de La Haye) went 'live', the International Court of Justice (ICJ), the International Criminal Court (ICC), and the other international tribunals and international organisations based in The Hague produced a remarkable number of judgements and decisions. The International Criminal Tribunal for the former Yugoslavia (ICTY) has been particularly productive, but it was by no means the only active court in The Hague. Under the auspices of the Permanent Court of Arbitration (PCA), perhaps a little less in the limelight of the media, also a number of significant decisions have been formulated. Apart from the judicial organisations, the 'legislative' and 'executive' international organisations based in The Hague, from EUROPOL to the Organisation for the Prohibition of Chemical Weapons (OPCW), have also performed with remarkable abundance and salience. With the ratification recently of a number of African states, the OPCW now covers 180 countries (or 98% of the world's population).

In this first editorial for the new Hague Justice Journal-Journal Judiciaire de La Haye (HJJ-JJH), I will only list some of the most remarkable decisions taken by Hague courts and tribunals in these six months. Further attention is paid to them in this first issue of the HJJ-JJH.

## *International Criminal Law*

Many of the judgements and other decisions of the ICTY not only further clarify the state of international criminal law but also provide invaluable sources of research for historians or political scientists studying the events that have devastated the Balkans in the 1990s. Examples of such judgements are those in the cases of Naser Orić, who was a senior commander of the Muslim forces defending Srebrenica, or Milomir Stakić, considered responsible for the atrocities in the Prijedor area. On 22nd March 2006, the Appeals Chamber upheld the conviction of Stakić. In 2003 the Trial Chamber found him responsible for over 1500 killings, of which 486 victims were identified. He was sentenced to life imprisonment, the highest sentence of the ICTY. On appeal that sentence was changed to a sentence of 40 years. As *Pauline Otten* argues in this issue, that reduction in years may in fact not mean that Stakić will spend fewer years in prison.

For international criminal lawyers, the full judgements of ICTY Trial or Appeal Chambers are often treasure troves. In some complex cases not only the final judgement, but also some of the intermediary decisions on specific questions can prove to be of great interest. The



*Hadžihasanović&Kubura case* provides an example of this. Both men were charged on the basis of superior criminal responsibility on a number of counts of violations of the laws and customs of war. In this case, the judges involved had to make several difficult separate decisions on sensitive issues regarding command responsibility. Command responsibility is probably the most important area in which the ICTY jurisprudence has enhanced the state of international humanitarian law. For a long time *Ruben Karemaker* has been working on this case. Here he reviews its main criminal legal issues.

The event that undoubtedly has drawn most attention to the ICTY, however, was not one of its judgements but the sudden death on Saturday 11 March 2006 of Slobodan Milošević. Milošević, the former president of Serbia and of the Federal Republic of Yugoslavia, was charged on the basis of individual and superior criminal responsibility, with genocide, crimes against humanity, violations of the laws or customs of war and grave breaches of the 1949 Geneva Conventions. His death ended the largest and most time consuming of the Tribunal's trials before the stage of the final judgement. *Paul Tavernier* provides a first reflection on the consequences of Milošević death for the future of international criminal adjudication. One implication for trials of 'dictators' or 'semi-dictators' charged with very serious international crimes, like Saddam Hussein or Charles Taylor, seems to be that the case should produce a relatively fast, albeit perhaps partial, judgement and a sentence. Getting a judgement and sentence regarding part of their deeds seems wiser than trying to obtain a conviction for the total range of alleged crimes. Researchers may find some consolation in the ICTY's decision to make (almost all) the very extensive documentation of the case available for further study.

Victims do not have a favourable position under the Statutes of the ICTY or the International Criminal Tribunal for Rwanda (ICTR). On 17 January 2006 the Preliminary Trial Chamber of the International Criminal Court (ICC) decided to change this for the ICC and further develop the position provided to victims in the Statute.

The ICC also became the host of Charles Ghankay Taylor. Taylor, the former president of Liberia, had been charged before the Special Court for Sierra Leone (SCSL). He is accused of criminal responsibility during the civil war in Sierra Leone, for planning, ordering and/or instigating numerous unlawful killings, acts of terrorism, sexual and physical violence, conscripting or recruiting children under fifteen into armed forces, and the list goes on. The SCSL, a 'hybrid' international tribunal, considered the security risks of his presence in Freetown so serious that it requested that the Taylor trial be moved to the ICC premises in The Hague. Taylor is generally seen as one of the major instigators (if not the main instigator) of the extremely cruel and disastrous civil wars in Sierra Leone and Liberia. In a sense, Milošević can be said to have been replaced in The Hague by another man accused of primary responsibility for a major armed conflict and the terrible crimes which ensued.

In the meantime, the ICC also got its 'own' first prisoner. Thomas Lubanga Dyilo is one of the leaders of the *Union des Patriotes Congolais* and the founder and commander in chief of the *Forces patriotiques pour la libération du Congo* (FPLC). He is charged with individual criminal responsibility for the use of children under 15 as soldiers and sending them into combat situations. Allegedly, these crimes were committed in the North East of the Democratic Republic of Congo.

Finally, the District Court of The Hague convicted the Dutch businessman Frans van A.<sup>1</sup> to 15 years' imprisonment. During the 1980s, Van A. was Saddam Hussein's most important supplier

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<sup>1</sup> In the Netherlands it is by law prohibited to release the full names of Frans van A. (and Guus K.).



of chemicals used for the production of mustard gas. According to the Court, the involvement of Van A. in supplying chemicals to Iraq was an essential contribution to the chemical weapons programme of Saddam Hussein's regime. On account of the chemicals supplied by Van A., the regime proved capable of carrying out a large number of attacks with mustard gas on the civilian population. The Court found that the chemical attacks during the 1980s were committed with the intent to destroy the Kurdish peoples in Iraq. These attacks amounted to genocide. More specifically, the Court concluded that at least Saddam Hussein, Ali Hasan Al-Majid ('Chemical Ali') and Hussein Kamal Hassan Al-Majid had all been responsible for that crime, thus in a sense anticipating the recent judgement of the Iraqi Special Tribunal in Baghdad. Although Frans van A. was eventually acquitted of complicity to genocide, he was convicted to 15 years in prison for complicity to war crimes. His involvement facilitated the attacks on the Kurdish people and made the carrying out of the regime's ambitions considerably easier. Another Dutch businessman, Guus K., was sentenced to eight years' imprisonment by the District Court in The Hague for violating a Dutch weapons embargo by delivering weapons to the regime of former Liberian President Charles Taylor. Both judgements have been appealed. These decisions by a domestic Dutch court drew significant international attention and, for one thing, it showed again that international criminal law is rapidly extending itself from an area of international law reserved for international tribunals to an eminent concern for national courts.

### *General International Law*

In the wider area of international law, courts and tribunals established in The Hague were equally prolific this half year. In particular, under the auspices of the Permanent Court of Arbitration (PCA) a large number of cases have been decided. *Ineke van Bladel* discusses in her article in this issue of the HJJ-JJH a PCA judgement of great importance for Belgium and the Netherlands, the 'Iron Rhine' case concluded in 2005. This case concerned a long standing dispute between both countries about a railway linking the Belgian port of Antwerp and the German Ruhr area. Belgium had acquired a right of transit for this railway across Dutch territory dating back to 1839, the time of the founding of the Kingdom of Belgium. Van Bladel ends her essay with an interesting comparison in respect of European Community law between this case and a pending PCA case, the *MOX Plant Case* between Ireland and the United Kingdom.

In December 2005, the Eritrea-Ethiopia Claims Commission, hosted by the PCA, produced seven Partial and two Final Awards in respect to the Ethiopian and Eritrean claims resulting from the disastrous armed conflict between these two poverty-stricken countries in the Horn of Africa. From an international legal point of view, in particular the Partial award regarding Ethiopia's Claims 1-8 (*ius ad bellum*) may be called rather spectacular. The Commission held that Eritrea had carried out a series of unlawful armed attacks against Ethiopia, which could not be justified as instances of self-defence in accordance with Article 51 of the United Nations (UN) Charter. Eritrea is internationally responsible for these acts of violence. With these Awards, the Commission has completed its examination of all the submitted claims and now faces the difficult task of assessing the damages and awarding (financial) compensation. In this first issue of the HJJ-JJH, *Romesh Weeramantry* introduces and explores the core legal issues of these important December Awards of the Claims Commission.



In the same month of December 2005, the International Court of Justice (ICJ) also decided on a question of responsibility for armed attacks. In its judgement of 19 December in the *Case of the Armed Activities on the Territory of the Congo (DRC v. Uganda)*, the Court decided, rather forthrightly, that Uganda was responsible for a violation of the prohibition of the use of force. If one takes into account how rarely responsibility for an armed conflict has ever been declared under international law (the UN Security Council included), these Hague decisions are more than memorable. *André de Hoogh* discusses the potential implications and further legal finesse of the ICJ judgement.

Another attempt by the lawyers of the Democratic Republic of the Congo to deal with its interfering neighbours will not lead to an ICJ judgement on the merits of the case. Rwanda has successfully challenged the jurisdiction of the Court in *The Armed Activities on the Territory of the Congo (New Application: 2002) Case (DRC v. Rwanda)*. Although *Willem van Genugten* basically agrees with the Court's argument, he laments how unfortunate it is that some of the important issues raised in this case will not be addressed. The *DRC v. Rwanda* case seems to illustrate once more how undesirable the limits of the ICJ's jurisdiction are, in particular if a State tries to shield itself from claims made against it concerning gruesome crimes like genocide. An element of reform of the United Nations should be to widen the Court's jurisdiction, e.g., upon request of the UN Security Council, at least to such cases.

Reform of the United Nations is a subject also touched upon by *Philippe Sands* in his kaleidoscopic overview of the state of international law after the major events which have taken place in the beginning of this century. In a widely ranging, highly critical essay, Sands focuses on 9/11 and the war in Iraq, and lucidly explores the essential legal (and political) issues that major armed conflict has brought up. In the view of the editorial board, the first issue of the journal could not have been opened with a more excellent and appropriate essay than this one. We hope it will set the standard for contributions that the Hague Justice Journal-Journal Judiciaire de La Haye may make to the advancement of studies in the field of peace and justice.

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